CHEOK HOCK BENG & ORS.

v.

LIM THIAN SIONG & ANOR.

HIGH COURT, BRUNEI
DENYS ROBERTS CJ
[CIVIL SUIT NO. 108 OF 1990]
10 FEBRUARY 1992

CONTRACT: *Breach of contract - Building contract - Failure to carry out construction work diligently - Delay - Agreement - Commencement of work - Construction date and time - Whether refusal of the MB to consider an extension of its approval - Material - Doctrine of frustration whether to apply - Whether agreements have become impossible of performance by reason of illegality - Whether reliance can be placed on self-induced frustration - Section 57 of the Contracts Act.*

BANKING: *Contract - Whether failure to provide a guarantee goes to the root of the contract - Breach - Whether breach is fundamental - Issue - Date of the start of construction - Breach whether vital - Whether agreement can be terminated - No proviso in the said agreement for repudiation on the ground that a guarantee had not been provided - Whether agreement in conflict with common law - Common law to apply.*

DAMAGES: *Liability - Quantum to be determined - Whether the rights of the parties at common law remain - Or - Whether restricted by terms of agreement - Dichotomy of liquidated and unliquidated damages - Plaintiffs seek a claim for general damages - No notice given per the provisions of the agreement - Common law principles to apply.*

CIVIL PROCEDURE: *Power of Attorney - Plaintiff owners seek revocation of power of attorney granted to the defendant developer - Irrevocable power of attorney - No issue found by Court as pertinent to rescinding the said power of attorney - Purpose for which power of attorney granted had wholly failed - Nothing on which the power of attorney can operate - Original copies to be returned to plaintiffs - Open to them to secure cancellation of the said power at the Attorney-General's Chambers.*

As a result of the various failures of the developers the owners (the plaintiffs) terminated the agreements on 12 May 1990 on the ground that the developers had repudiated them or were unable to perform them.

The owners assert that they have lost the rental which they would have received from the agreements, at B$15,000 per month per flat until completion, or the market value of the flats plus the value of land. The owners (plaintiffs) also sought other forms of relief.

The principal complaint of the owners was that the developers were guilty of long and unnecessary delays in the development of the site.

On 30 April 1984 an agreement was signed for the building of the flats with the consent of all parties ESC was appointed as architect not later than July 1984. Plans were prepared by ESC and submitted to MB for approval in October 1984. Further plans were forwarded by ESC in June 1986 and rejected in July 1986.

ESC was succeeded as architect by PIA in February 1987. On 28 April 1987, a meeting was held at the PIA office to discuss the project. Drawings were submitted to MB for approval on 23 June 1987 and 29 September 1987. The MB replied on 28 March 1988, listing a number of requirements. The plans were altered and resubmitted by PIA on 6 May 1988.

On 29 July 1988 PIA wrote to owners and developers to say that MB had informed PIA verbally that approval would be given. Inspite of various reminders from PIA, written approval of MB was not given until 16 October 1988 nearly 41/2 years from the first agreement. On 25 November 1988, at the PIA'S office, the developers agreed to a programme of works drawn up by PIA. Construction was to begin on 1 May 1989 and be completed in 15 months. There was no separate item for earthworks and site preparation, which were included in the construction period.

On 24 February 1988, it was agreed by both parties that tender for the main contract should be called for. This was done on 14 March, with 3 April as the closing date. On 23 March, the developers were given sets of the drawings for the earthworks.

Inter alia, at a meeting dated 17 May the developers confirmed that Tong Tai (the contractor) would carry out the earthworks, starting on 22 May and finishing on 21 June. It was also observed by the learned Judge that all the agreements were in writing and signed by owners and developers and that there had been no dispute as to their authenticity, though there has been about their meaning.

Held:

[1] The stamp on the back of this letter puts a limit of time on approval only if "no development on the works on the building" has taken place. Unless this happens, there is no need to refer to MB again, save for approval to the pegging. The letter refers to the use of the building as a place of residence, which would not occur inside the 12 month period.

[2] The agreements could therefore be said to have become impossible of performance by reason of illegality from 22 November 1989, even though MB has never given any reason for its refusal at that time of any approval to extension of the period of one year which expired on 15 October 1989.

[3] In the agreements there are various reference to the "date of construction" and to similar phrase. Unfortunately, they do not seem to have been used in the same sense in all instances. What is important, however is what the agreement say, which this Court takes to be reflection of what was intended, at the time, so far as this was in the contemplation of the parties, rather than what the owners and developers now say these meant.

[4] The learned Judge was satisfied that where ever the word" construction" appears, whether or not it is followed by the words" of the flats", it includes all works on the site (or indeed on adjoining land if necessary) which are connected with the blocks of flats. This means that work on the blocks of flats began at about the end of May 1989, when the earthworks were started, and that from that date the developers were obliged to give a banker's guarantee and in certain events, to pay the owner for the land.

[5] Nevertheless, the provisions of a guarantee is a matter of considerable importance in a building contract. This Court regards the failure to provide such a guarantee as a breach of a fundamental condition of the agreements, committed by the developers before the end of May 1989.

[6] It is to be noted that the agreements do not provide for repudiation on the ground that a guarantee has not been furnished though it does in other events. However, the agreements are not comprehensive and, as far as they are not in conflict with the common law, the latter will apply as well.

[7] The learned Judge held that the owners were justified in ending the agreements in May 1990, on the grounds that the developers had been so dilatory in their performance as to show an intention to abandon the contract before performance became impossible and were at fault in their failure to forward a banker's guarantee to the owners as provided for in the agreements.

[8] At common law, mere delay does not, of itself amount to a repudiation of the contract, unless this is of such a nature as to show that the contractor is unable or unwilling to complete.

[9] If time is not the essence of a contract delay by a contractor does not amount to repudiation unless it can be shown that the contractor will not or cannot carry out the contract. It has been said that it is desirable to give notice to a contractor that continuance of the delay would be treated as a repudiation. The history of this matter shows that warnings were issued by the owners or by the developers' own architect, before the agreements were repudiated by the owners.

[10] The Court must look at the underlying object of the contract and decide if it has been frustrated. The learned Judge found as a fact that the underlying purpose of the agreements was the construction by the developers of 36 flats on land provided by the owners. This the learned Judge found became illegal on 22 November 1988.

[11] The Court held that, no notice was ever given, such as would have brought this cause into effect, nor was any reference made to it in correspondence between the parties before the contract was repudiated. Thus the owners are not bound by any of the provisions of the agreement for liquidated damages and are entitled to claim at common law for any loses which they may have suffered.

[Order in terms and counter claim dismissed.]

Cases referred to:
Swartz & Son (Pty.) Ltd. v. Walmaransstad Town Council [1960] SALR 1 ***(cons)***
Establishment Chainbaux v. Harbormaster Ltd. [1955] 1 LI R 303 ***(foll)***
Yong Ung Kai v. Enting [1965] MLJ 98 ***(cit)***
Maritime National Fish Ltd. v. Ocean Trawlers Ltd. [1935] AC 524 ***(foll)***
Bank Line v. Arthur Capel & Co. [1919] AC 435 ***(foll)***
Mertens v. Home Freeholds Company [1921] KB 524 ***(foll)***

Legislation referred to:
Contracts Act [Brunei], s. 57

For the plaintiffs - Andrew Ong; M/s. Choo Chan & Wong
For the defendants - Francis Chiew; M/s. Francis Chiew & Co.

JUDGMENT

Denys Roberts CJ:

This action, which is in many respects an unfortunate one, arise from the plaintiffs' agreement that part of the land registered in their names at Kampong Kianggeh, would be developed by the defendants. I should make it clear from the outset that, although I heard much oral evidence as to what the parties believed and what they did, my findings are to a large degree based upon documents and letters.

The Statement of Claim

The plaintiffs, who are brothers, are the registered legal owners of undivided shares in Lot 16575 at Kampong Kianggeh, Bandar Seri Begawan. This lot comprises about 45 acres in all.

The plaintiffs (the owners) entered an agreement (the first agreement) on 30 April 1984, for the development of part of this land, amounting to about 45 acres, by the defendants, who carry on business under the name of the Magnificent One Engineering Company.

The first agreement, to which I will refer later in more detail, provided, among other matters, for the defendants (the developers) to build 48 flats on this land at their expense. The developers were to retain 60% of the flats in consideration of their part in the development of the land.

Approval from the Municipal Board (MB) was obtained only on 16 October 1988, for the building of 36 flats on the site. The permit was to expire after one year in certain events which were set out on the back of the permit.

The second agreement between the parties was entered on 29 November 1988. This provided for 36 flats (instead of 48). There was to be a power of attorney, which would enable the developers to convey the freehold in their flats to purchasers and not only a 99 year lease, as had been permitted by the first agreement. The developers were to pay B$880,000 for the land on which their flats were to be built.

By a third agreement, dated 9 March 1989, the developers were to pay B$850,000 by 14 instalments to the owners for the land. Construction was to begin on or before 1 May 1989.

Construction began about 1 May 1989, and the developers paid the first instalment for the land of B$60,000 about 15 June 1989.

The developers, so the owners alleged, failed to carry out construction works diligently, as a result of which failure the owners warned the developers in writing, about 2 October 1989, that they would end their agreements with them unless "concrete works" were carried out forthwith.

By October 1989, the developers had carried out soil excavation, earth removal, part of the slope protection and a retaining wall. They had not begun work on the construction of the flats themselves.

On 13 October 1989, the developers' architect sought an extension of the approval given by MB on 16 October 1988. On 22 November 1988, the MB replied saying that the application was still under consideration and that "You are therefore instructed not to commence any work until our written approval is obtained."

The developers did not furnish the banker's guarantee, which is referred to in Clause 9 of the first agreement and Clause 8 of the third agreement. Nor did they pay further instalments of the amount due in respect of the land.

As a result of the various failures of the developers, the owners terminated the agreements on 12 May 1990, on the ground that the developers had repudiated them or were unable to perform them.

The owners assert that they have lost the rental which they would have received from the agreements, at B$1,500 per month per flat until completion, or the market value of the flats plus the value of the land. The owners also sought other forms of relief.

The Defence

By their amended defence and counterclaim, the developers alleged that it was the duty of the owners to obtain all the necessary approvals to the plans for the development of the owners' land. The owners appointed as architects, on 21 July 1984, ESC whose plans were not approved by MB apparently because these plans were not prepared by a qualified architect.

About 2 October 1986, the developers employed another architect, Pengiran Ismail Arkitek (PIA) to draw fresh plans and to make another application to MB. This was done and the permission of MB was given by letter dated 16 October 1988.

The payment of B$60,000 is admitted but this was said to be in response to the owners' threat to end the agreements if they did not receive this sum of money forthwith.

The approval of MB was due to expire in certain events on 15 October 1989 and a letter seeking an extension was written by PIA. A reply, dated 22 November 1989 was received from MB, asking that work on the site should not proceed.

On 30 October 1990, MB informed PIA that approval could not be given until MB had further information on the master plan for the development of Kampong Kianggeh in the 6th National Dvpt. plan. This refusal, for the same reason, was repeated in letters from MB to PIA on 31 January 1992 and 28 January 1992.

The developers say that payments for the land were due under the third agreement only on "actual construction from the proceeds of sale through the developers progress claims for work done on the project". They argued that as actual construction of the flats had not started, they were not liable to pay anything.

The developers are said to be willing to provide a banker's guarantee for B$250,000 this being over 10% of the actual construction costs of B$2,253,953.85, the tender of Syarikat Tiara Sdn. Bhd. for the building of flats.

The developers deny that they have broken or repudiated any of the agreements, and state that they were performing works under them until the owners unlawfully ended the agreements on 12 May 1990.

As an alternative, the developers maintain that the contracts between the parties were frustrated by the refusal of the MB to consider any extension of its approval until the 6th National Development Plan is available.

The developers say that they have carried out their duties diligently under the agreements and that the owners are in breach of them by wrongfully ending them.

They counterclaim for damages of B$984,802 (which consists of expenditure incurred by the developers) plus B$1,981,000 for loss of profits.

Reply

The owners, in reply, assert that all necessary permissions had to be sought by the developers. They deny that they were paid B$60,000 in response to threats. This payment was made because they reminded the developers that the first instalment was due as soon as construction works had begun.

The owners deny that they were told that a banker's guarantee, even for the lower amount, was available.

In the alternative, the owners argue that, if there were no construction works, the developers failed to comply with Clause 5 of the third agreement, which required construction to begin on or before 1 May 1989.

The frustrating event, the owners say, was caused, or contributed to, by the default of the developers. Consequently, the owners did not break the agreements by terminating on 12 May, since they were entitled to do so. They deny that the developers are entitled to any damages. There is an alternative plea that the agreements are void for want of certainty in relation to the beginning of construction, the costs of development and the shares of the owners and the developers in the development.

The Three Agreements

I do not propose to repeat all the clauses of the three agreements, but merely to summarize those which seem to me, at the end of the hearing, to be of some importance. All the agreements are in writing, and signed by owners and developers. There has been no dispute as to their authenticity, though there are about their meaning.

The first agreement, dated 30 April 1984, provided for the following matters:

(a) The developers were to construct three blocks of flats on the site at Kampong Kianggeh (Clause 2).

(b) All construction costs, architects' fees and other expenses were to be borne solely by the developers (Clause 4).

(c) The developers were to receive 60% of the flats, on which 99 years leases were to be granted by the owners (Clause 5)

(d) The owners were to obtain all necessary approvals from the authorities. If approvals were given at different times for three phases of development, the developers should complete construction within 20 months of date of each approval (Clause 6). The construction of all the 36 flats was approved in the same letter of 16 October 1988, from MB.

(e) The developers were to furnish the owners with a banker's guarantee, for up to 10% of the construction cost (Clause 9), before commencement of the work on the three blocks of flats.

(f) The developers were deemed to have repudiated the agreement if the necessary approvals are obtained and three months notice to work was served by the owners, with which the developers failed to comply (Clause 10).

(g) If the developers stopped work on the project and one month's notice was given by the owners to complete, the developers were deemed to have repudiated if they did not comply. 10% of the cost of construction was to be payable as liquidated damages to the owners (Clause 12).

(h) The developers were to pay to the owners B$200 per day if they fail to complete within the period allowed, as liquidated damages (Clause 13).

(i) If the owners break the agreement or hinder the developers, the owners must pay to the developers any money spent so far and for loss of profits (Clause 22).

(j) The developers are to start work within one month of receipt of all necessary approvals from competent authorities (Clause 24).

The second agreement, of 29 November 1988, was expressed to be supplemental to the first agreement. It was necessary because approval had been given by MB on 16 October 1989, to the building of 36 instead of 48 flats. This agreement, however, was largely abortive, apart from the number of flats permitted.

The third agreement, of 9 March 1989 was expressed to be supplemental to the first and second agreements. Its main provisions were:

(a) A power of attorney was to be created in favour of the developers, empowering them to sell those flats which were part of their share, freehold to purchasers (Clause 1). Such a power was created on 30 March 1989.

(b) The developers were to pay to the owners B$850,000 for the owners' land, by fourteen instalments "commencing from the date of actual construction, from the proceeds of sale through the developer's progress claims for work done on the project ..." (Clause 4).

(c) The developers were to "Commence construction on or before the 1 May 1989" (Clause 5).

(d) "Upon commencement of the construction", the developers were to render to the owners, a banker's guarantee and were to be liable also for liquidated damages under the first agreement (Clause 8).

Permission of Municipal Board

It was not in dispute between the parties that no building development can take place in Brunei without the prior written approval of the MB. PIA sought this on the basis of plans which it submitted in June 1987 and after alteration of them, in May 1988.

Approval was given by MB by a letter to PIA dated 16 October 1988. On the back of this letter was a stamp in Malay. The English translation of this reads as follows:

> This approval will be expired by itself if development or works on the building have not commenced within a period of one year from the date of this approval in accordance to section of the Regulation and Control of Buildings and Building Operations s. 2(II) Brunei Municipal Board Act (By-Laws) 1920.

This approval was the only one which is required provided that:

(a) the construction of the 36 flats took place in accordance with the plans of PIA; and

(b) the pickets of its position were placed and reported to MB for inspection and approval before "construction of the building".

The stamp on the back of this letter puts a limit of time on the approval only if "no development or the works on the building" has taken place. Unless this happens, there is no need to refer to MB again, save for approval to the pegging. The letter refers to the use of the building as a place of residence, which would not occur inside the 12 month period.

Mr. Wong was of the view that the PIA letter of 13 October 1989 was unnecessary. In his opinion, the approval given on 16 October 1988 did not need any renewal, since construction work, of the nature specified in the PIA letter, had taken place.

The condition attached to the approval states that the permit will lapse in a year if "development or works on the building have not commenced". Thus no further permission, apart from the MB's approval of the pickets, was necessary if this condition meant that either development of the site or works on the building had taken place. But if the condition meant

that both development and works on the building had to take place, the approval would have run out and would have to be renewed, since nothing had been done on the flat buildings.

The writer of the PIA letter of 13 October 1989 did not give evidence. I can only assume that it was written to be on the safe side. Since nothing beyond earthworks and slope protection had been carried out by the developers, PIA thought it prudent to seek an extension of the approval already granted by MB. In view of the equivocal terms of the above condition, this is not surprising, taking into account MB's verbal warning to Mr. Robert Cheok that the scheme might be frozen if there was no progress before October 1989.

The result of this letter was unfortunate. MB replied to PIA on 22 November 1989 to the effect that the PIA application for an extension of approval "which expired on 16 October 1989, is still under the consideration of the Board." PIA was asked "not to begin any work before obtaining another approval from this office."

PIA wrote reminders to MB on 12 December 1989, 2 February 1990, and 9 February 1990 and 11 April 1990. No answer was received until 9 May 1991, when MB asked for the plan which MB had already approved to be sent to it. This letter gave no reason no reason for the delay. PIA replied to it on 18 May 1990, forwarding copies of its plans for the lot.

MB finally replied on 30 October 1990 to PIA regretting that MB was "unable to give a positive consideration yet to your application". The reason given was that the details of the Sixth National Development Plan were still awaited. On 25 January 1991, MB wrote a further letter to PIA saying renewal of the approval was withheld and that all works on the site were suspended until the details of the master plan were suspended until the details of the master plan were known. Another letter to the same effect was written by MB to PIA on 28 January 1992.

What is the effect of these letters? Perhaps PIA could be said to be at fault in seeking the further permission of the MB when this was not necessary, but it is difficult to fault them for being careful.

Similarly, it would be wrong to criticize MB for deciding that approval was needed for an extension of the time allowed for the works when this was sought by the developers' own architect.

Perhaps MB can be criticized for its slow reaction to the letter of PIA of 13 October 1989, since it was over a year before a reason was given as to why permission had not yet been given though the preparation of the National Plan may have put it in difficulty. However, although no reason was advanced by MB, in its letter of 22 November 1989, this forbade PIA to begin any work on the site, which PIA interpreted as a ban on any further work.

It may well be that, if the placing of pickets by the main contractor had been approved within the period of twelve months by MB, construction of the blocks would have continued and no further approval would have continued and no further approval would have been sought by PIA from MB. The only apparent reason why PIA thought an extension was necessary in October 1989 was because building work had not started on the block of flats and because, in the previous twelve months, from October 1988 to October 1989, nothing but earthworks and some slope protection had been carried out.

It is worth noting that, when PIA approached MB for an extension, they were acting as agents for the developers, by whom they were employed, whom they were representing and to whom they referred as their clients.

Thus, it would have been illegal to continue work on the site after 22 November 1989, though approval was later given verbally by MB, and confirmed by a PIA letter of 14 December to MB, allowing slope protection work to be finished.

The agreements could therefore be said to have become impossible of performance, by reason of illegality, from 22 November 1989, even though MB has never given any reason for its refusal at that time to give its approval to any extension of the period of one year which expired on 15 October 1989.

Date of Construction

In the agreements there are various references to the "date of construction", and to similar phrases. Unfortunately, they do not seem to have been used in the same sense in all instances.

The owners and developers have expressed their opinion as to what they believe the phrases meant; so have the architects and the parties' solicitors in correspondence. What is important, however is, what the agreements say, which I take to be reflection of what was intended, at the time, so far as this was in the contemplation of the parties, rather than what the owners and developers now say these meant.

Was there any construction?

Mr. Stephen Wong, who was one of three architects engaged by PIA on the development scheme, gave evidence (and I accept what he says as being reliable) that work began on the site at about the end of May, 1989. His professional view, which I take into account, is that where the agreements refer to "the commencement of construction" or "actual construction" they include references to the preliminary work on the site. This, among other things, will include the earthworks, which may make it necessary, as happened in this case, to remove soil from the site, any access road involved and slope protection.

All of these steps were taken before PIA wrote to MB on 13 October 1989 seeking an extension of MB's approval. Therefore Mr. Wong was satisfied that construction did begin well before the 12 month period mentioned in the MB's letter of 16 October 1988 had elapsed.

The defendants, however, contended that "construction" means only the building of the flats themselves and is not intended to include the preparation of the site for building. Both parties agree that no building of the blocks of falts has taken place.

Clause 2 of the first agreement provides that "there shall be constructed" on the land three blocks of flats.

By Clause 4, all "construction costs, architect's fees and other expenses" including earthworks, shall be borne by the developer.

In Clause 5, the owners are to execute a 99-year lease for "each unit of flat, to commence from the date of construction".

Clause 6 obliges the developers to complete the construction of each phase "within 20 month of approval being given".

Clause 9 obliges the developers "before commencement of the works on the said 3 blocks of flats" to furnish a banker's guarantee of 10% of the "construction cost".

Clause 18 contains a convenant by the owners to execute a lease "upon the commencement of the construction of the project" to the developers for 60% of the "flats constructed".

Clause 20 refers to "construction of the said 3 blocks of flats and allows for the extension of the completion period in certain events.

Clause 23 imposes on the developers a duty to maintain various insurance policies "during the construction period".

The second agreement relates that the developers have agreed to "develop part of the owners' land" and "to construct thereon three blocks of flats". The same distinction is made in the preamble to the third agreement.

Clause 4 of the third agreement makes the developers liable to pay by instalments for the owners' land "within a period of fourteen (14) months commencing from the date of "actual construction".

Clause 5 says that the developers "shall commence construction on or before 1 May 1989".

By Clause 8, "upon commencement of the construction" the developers are to render the banker's guarantee required under Clause 9 of the first agreement and shall be liable for the liquidated damages in Clause 12 thereof.

The defendants concede that the phrase "shall commence construction" in Clause 4 is a comprehensive one and includes earthworks and not merely the building of the flats themselves, but argue that the reference in Clause 8 of the third agreement to Clause 9 of the first agreement shows that what was meant in Clause 8 was "commencement of the works on the blocks of flats".

Consequently, it is submitted, there had been no construction within the meaning of Clauses 4 and 8, since the phrases "actual construction" in Clause 4 and "construction" in Clause 8 both refer only to the building of the flats and not to any preparatory work.

I find this an unreal distinction and one which, if it is to have effect, must be stated in clear terms by the parties. They are, of course entitled to define construction in any way they wish, but it should be unequivocal, if it is artificial.

The earthworks which are necessary to level the site are necessarily part of the expenses of building the blocks of flats, as are the cost of drainage, access roads and retaining walls. The expense involved these matters is contained in the tender, which is what happened in this case.

Throughout both agreements the word "construction" appears frequently. Can it be said that it does not include earthworks, and that these are not part of the building of the flats?

In Clause 4 of the third agreement the phrase "actual construction" is used. It said that this refers only to work on the flats themselves. Whereas in Clause 5 "construction" includes earthworks. I cannot agree that the use of the word "actual" makes any difference. I am satisfied that, wherever the word "construction" appears, whether or not it is followed by the words "of the flats", it includes all works on the site (or indeed on adjoining land if necessary) which are connected with the blocks of flats. This will include all work which is preparatory to the building, since this is part of the unavoidable cost of providing the flats.

This means that work on the blocks of flats began at about the end of May 1989, when the earthworks were started, and that from that date the developers were obliged to give a banker's guarantee and, in certain events, to pay the owners for the land.

Payment for the Land

It was not until the third agreement, on 9 March 1989, well after MB had given permission to build, that the developers became obliged to pay B$850,000 in instalments, for the owners' land, commencing from the actual date of construction "from the proceeds of sale, through the developers' progress claims for work done on the project."

The owners have argued that the words "from the proceeds of sale" are descriptive and not exclusive. The words do no more, it is said, than show one of the sources from which payment is to be made, and do not specify the only source.

I do not agree that the words used are reasonably capable of such a construction. It appears, however, that this was the view taken by the first plaintiff, who sought payment of the first instalment in June 1989, earthworks having begun about the end of May 1989. Mrs. Foo paid him B$60,000 by cheque, which she stopped when she received legal advice that no sum was due to the owners as payment for the land. The first plaintiff spoke to her about her cheque being dishonoured. She paid him B$60,000 in cash at the end of June. According to her evidence, she did so in response to a threat by him that, if she did not pay up, the agreements might be terminated.

Mr. Gregory Cheok denies that he ever delivered any threats. Even if that was so, I have no doubt that he said something which Mrs. Foo could fairly regard as a threat to end the agreements, unless he was paid.

I so find because I am sure that, by the end of June 1989, long after permission had been given by MB and tenders had been secured by PIA, no main contract had been awarded and nothing but earthworks, which should have been finished before the end of June 1989, had taken place on the site. The owners must, by then, have been anxious as to the intentions of the developers.

Mrs. Foo took what she called a "booking fee" from each of three prospective purchasers about March 1989, though none of them was given any sale or purchase agreement. These fees were returned to them in about August 1990.

Mrs. Foo explained that she took these fees because she wanted to be sure that the purchasers were serious. If a start had been made on the flats, she would have issued a contract of sale to each of them.

I do not think that these payments can reasonably be described as developers' progress claims for work done on the project", because in March 1989, nothing had been done at all on the site. Nor could they be fairly described as the proceeds of sale, though they were taken from prospective purchasers.

In the result, I find that, whatever the parties may have thought, the developers were not, though actual construction had begun, obliged to pay anything in respect of the land, because nothing ever came to the developers as proceeds of the sale of flats nor as progress claims. I do not accept the argument that the payment for the land could come from any source. It could only come from the sources specified in Clause 4 of the third agreement.

Banker's Guarantee

Clause 8 of the third agreement requires a banker's guarantee to be rendered to the owners "upon commencement of the construction." I have already found that this includes any earthworks and that these began before the end of May 1989. Clause 9 of the first agreement stated that this guarantee should be given "before commencement of the works on the flats".

There is conflict here, as in my view the phrases mean that a banker's guarantee should have been provided either when the earthworks were begun, or before commencement. If there is a conflict, the later agreement should prevail and guarantee should therefore have been given upon commencement of the earthworks in May 1989, though the difference, in this case, is small.

By May 1989, tenders had been called for and examined by PIA. If the lowest tender was taken, namely that of Syarikat Tiara, a sum of about B$427,650 would have to have been secured as a banker's guarantee by the developers.

This was clearly in the mind of the developers, who approached A & S Associates for a performance bond, to back the banker's guarantee. A letter of 28 April 1989, expenses the willingness of A & S to enter such a bond for B$2,500,000 Nothing further was done.

It is to be noted that the failure of the developers to provide a guarantee was not referred to in the owners letter of 2 October 1989, nor was it given as a reason for terminating the agreements in the first plaintiff's letter of 6 March 1990, though it appears in that written by plaintiffs' solicitors on 6 April 1990 and in the owners 'letter of 20 April 1990'.

Can it be said that the failure to provide a banker's guarantee was such a fundamental breach as to entitle the owners to terminate the agreements?

The first agreement provided in Clause 24 for work to begin within one month of approval being given. The third agreement, however, superseded this and provided for construction to begin on or before 1 May 1989. It was from that date, that is, the start of construction, that the banker's guarantee became due.

Mrs. Foo testified that she was never asked for a banker's guarantee before the letter of 6 April 1990. Mr. Gregory Cheok, however, says that he asked for this from the defendants, who promised to produce it but never did.

The first plaintiff was under the impression that the banker's guarantee had to be provided within a month of approval being given. This, was correct, in the sense that under the first agreement it had to be given before "construction commenced", which had to be within a month of all approvals being given.

I accept the first plaintiff's evidence that he asked Mrs. Foo and her husband several times about the banker's guarantee, originally in relation to the first agreement. This was later superseded by the third, which did not require the guarantee to be given until the start of work, which was supposed to be 1 May 1989, after which the matter was again raised with the developers by the owners.

The evidence does not show that the owners regarded this failure as of great importance, though they mentioned the matter to Mrs. Foo, until April 1990, when it was referred to in a letter. Nevertheless, the provision of a guarantee is a matter of considerable importance in a building contract. (*Swartz & Son (Pty.) Ltd. v. Walmaransstad Town Council* [1960] SALR 1).

I regard, the failure to provide such a guarantee as a breach of a fundamental condition of the agreements, committed by the developers before the end of May 1989. Their failure to do so can be attributed to their belief that, as there had been no work on the building of the flats, they were not obliged to provide such a guarantee. Such a belief, which I am satisfied was wrong, does not prevent the owners from relying upon it as a breach of a vital term, in the absence of which the owners would not have entered the agreements.

It is to be noted that the agreements do not provide for repudiation on the ground that a guarantee has not been furnished, though it does in other events. However, the agreements are not comprehensive and so far as they are not in conflict with the common law, the latter will apply as well.

Delays by Developers

The principal complaint of the owners was that the developers were guilty of long and unnecessary delays in the development of the site.

It was long ago as 30 April 1984 that an agreement was signed for the building of the flats. With the consent of all parties, ESC was appointed as architect not later than July 1984. Plans were prepared by ESC and submitted to MB for approval in October 1984. Further plans were forwarded by ESC in June 1986 and rejected in July 1986.

ESC was succeeded as architect by PIA in February 1987. On 28 April 1987, a meeting was held at the PIA offices to discuss the project. Drawings were submitted to MB for approval on 23 June 1987 and 29 September 1987. The MB replied on 28 March 1988, listing a number of requirements. The plans were altered and resubmitted by PIA on 6 May 1988.

On 29 July 1988 PIA wrote to owners and developers to say that MB had informed PIA verbally that approval would be given. Inspite of various reminders from PIA written approval of MB was not given until 16 October 1988 nearly 4½ years from the first agreement. On 25 November 1988, at the PIA office, the developers agreed to a programme of works drawn up by PIA. Construction was to begin on 1 May 1989 and be completed in 15 months. There was no separate item for earthworks and site preparation, which were included in the construction period. On 24 February 1989, it was agreed by both parties that tenders for the main contract should be called for. This was done on 14 March with 3 April as the closing date. On 23 March the developers were given sets of the drawings for the earthworks.

The tenders were examined at a meeting in the PIA offices, attended by Mrs. Foo. In accordance with the advice of the quantity surveyor that the tender of Syarikat Tiara was too low, PIA recommended that the main contract, at B$5,168,541.30, should be given to Fong Leong Construction Co., the second lowest tenderer. The developers were asked for an immediate decision. At a meeting of 17 May the developers confirmed that Tong Tai would carry out the earthworks, starting on 22 May and finishing on 21 June 1989.

On 18 July 1989, PIA wrote to the developers, noting that the latter would become the main contractor. On 18 August, however, PIA, wrote again to the developers, saying that they awaited the nomination of a main contractor, following a change of intention by the developers to employ one contractor. PIA warned the developers in these terms:

> The landowners had expressed their disappointment over the long delay and requested that the building works as well as the other ancillary works to be carried out immediately. They are worried that this delay might change the authorities' decision by freezing this approved development.
>
> We wish to remind you that the landowner may stop the whole works if no improvement are shown on site to their satisfaction and they have expressed that all consequences to this stoppage will be borne by your company.

On 22 August 1989, PIA again wrote to the developers, asking for a main contractor to be appointed.

On 2 October 1989 the owners wrote to the developers recording their concern at the state of affairs on the construction of the flats. They expressed anxiety lest planning approval might not be renewed, adding:

As it is, we have information that future projects in the area are freezed and our land may be affected.

The owners were also concerned that progress on the site was so slow that the developers might be unable to complete within the agreed period for construction. The owners warned the developers that, if concrete work is not carried out forthwith, the contract might be terminated.

PIA wrote on 13 October 1989, to MB informing it that earthworks were complete, except for slope protection, and the pegs would shortly be set for the building. The latter was never done, though slope protection was later completed.

On 22 November, MB replied, saying that the application for an extension was being considered by the MB and that PIA was instructed not to commence any work until "our written approval is obtained."

No such approval has yet been given. No reason has been offered as to why the application was not extended in November 1989, though in October 1990, when MB replied to several reminders by PIA, it was stated that the application could not be dealt with until details of the National Development Plan were available

It may well be that a renewal was not given in November 1989, by MB, because of the possibility that National Plan would freeze development of the area. If this was the reason, rather than the slowness of the developers, it would have the effect of frustrating the agreements between the parties, since it rendered further development of the site illegal. But it would not have had the effect of removing from the owners any rights which they had already acquired against the developers.

Why was it that the developers, who must originally have been as keen as the owners to complete the project and take their share of the profits, were so slow in the work on the site, as they undoubtedly were? I note that, although the permission expired in October 1989, nothing was done on the site until May 1989, when an earthwork contractor, employed by the developers, began work on the site, eight months after approval was given.

It was, I think, partly because the developers, in spite of warnings which they received, thought that approval would be given for the project, so long as some work, however small, had been done on the site.

And it was partly because the developers had been led to expect a substantial profit, amounting to B$1,981,000 according to a report submitted to them by a firm of quantity surveyors (ARTA) in November 1988. This was based on a figure of B$2,375,000 for construction costs. It must, therefore, have been an unpleasant shock to the developers to discover, when tenders were considered in April 1989, that in addition to other extra items of expenditure, about a further B$1,900,000 if Syarikat Tiara's tender were accepted or $2,800,000 if that of Fong Leong was taken would have to be found by the developers.

No reply was ever given by the developers to letters written by PIA asking them to award the main contract. Pg Hj Zainuddin, of Syarikat Tiara, testified that he never signed any contract for the work, on the site, although he had been told by PIA that his firm was to get it. Mrs Foo agreed that there was nothing in writing, though she says that she had told Syarikat Tiara verbally that she had awarded the contract to them.

It may be that she did have discussions with them, but I do not accept that there was ever a concluded contract between her and Syarikat Tiara. Even though the latter had submitted the lowest tender, the developers could not, as I find, make up their mind what to do, even

on the basis of an increased sale price of B$265,000 per flat as opposed to the B$220,000 on which the Arta report was based. The developers were no doubt attracted by the possibility that some of the work could be done more cheaply and appointed their own earthworks contractor and sub-contractors no doubt in an effort to enhance their profits. No main contractor has ever been appointed as I am satisfied would have happened if the developers had "diligently commenced work" as they were required to do by Clause 6 of the first agreement.

In their letter of 23 March 1990 to the son of one of the owners, PIA expressed the opinion that:

> the building works could have been commenced during the period of building approval but was unable to commence due to our clients misgivings and unfortunate circumstances.

PIA does not say what these were. I believe that they must have been referring to the developers' inability to decide whether an adequate profit could be made and whether to award the main contract. This resulted in a general failure of the developers to continue the project with proper vigour. If they had begun building works within the year, I have no doubt that the project would have proceeded, as no doubt that the project would have proceeded, as no permission for any extension of time would have been submitted and there is no evidence to suggest that any project was frozen if work had been done on it in accordance with the MB permit. It was because nothing but earthworks had been finished that PIA, to be prudent, decided to renew the permit which had been issued by MB.

Termination of Agreements

I have already referred to the letter of 23 March 1990, written by PIA to Mr. Allan Cheok.

Following this letter, the first plaintiff wrote on 28 March 1990 to the developers, giving notice of termination of the agreements from 6 April 1990, stating:

> We take the view that the inordinate delays in the construction works confirm that you are unable and not in a position to carry out the development project.

The developers were asked to reply by 20 April as to why the development agreement should not be terminated.

On 4 April, the defendants did reply, refuse to agree that the agreements should be terminated and insisting that:

> construction works have started and we have completed the earthworks.

They added that:

> We are proceeding with the construction works as soon as the building approval is renewed.

I remind myself that, although the building permit has never been renewed, up to 28 January 1992, more than a year after the date for completion of construction, taking 1 May 1989, as the commencement of it, I must consider only the situation which faced the parties when the owners repudiated the agreements on 12 May 1990.

On 6 April, the plaintiffs' solicitor wrote in reply, in terms which differ somewhat from the arguments advanced at the trial. This letter denied that there had been commencement of construction, as provided for in Clause 5 of the third agreement.

On the other hand, it was argued, that if construction had started, the defendants would be obliged to pay $660,000 as arrears of instalments for the purchase of the land and to render a banker's guarantee for B$500,000 this being the plaintiffs' estimate of 10% of the construction cost.

On 20 April, the second and third plaintiffs wrote to the defendants, asking for payment of the arrears of B$660,000 and a banker's guarantee for B$500,000 by 30 April, failing which the agreements would be determined.

On 25 April, the developers' solicitors again refused to regard the agreements as at an end. On 12 May, solicitors for the owners determined all agreements between owners and developers.

This is an unhappy story of delay and there is no doubt that the blame for this must lie with the developers, who failed to ensure that such substantial work was carried out on the site as would have made it unnecessary for PIA to seek any extension of time.

I hold that the owners were justified in ending the agreements in May 1990, on the grounds that the developers had been so dilatory in their performance as to show an intension to abandon the contract before performance became impossible and were at fault in their failure to forward a banker's guarantee to the owners as provided for in the agreements.

I fear that the sad truth is that the developers took on a project which was larger than they could manage properly and would only have brought them a small profit if they had completed it. This has left the owners with an undeveloped site and without the profits which they hoped to derive from its development.

I have to decide what remedies are available to the owners, under the agreement or at common law.

At common law, mere delay does not, of itself amount to a repudiation of the contract, unless this is of such a nature as to show that the contractor is unable or unwilling to complete.

If time is not the essence of a contract, delay by a contractor does not amount to repudiation unless it can be shown that the contractor will not or cannot carry out the contract. It has been said, in *Establishment Chainbaux* v. *Harbormaster Ltd. [1955] 1 LI. R. 303*, that it is desirable, to give notice to a contractor that continuance of the delay would be treated as a repudiation. The history of this matter shows that warnings were issued by the owners or by the developers' own architect, before the agreements were repudiated by the owners.

Frustration

One of the main issues raised at the trial was the extent to which the contract was frustrated by the refusal of the MB to renew its approval to the building of the flats.

Section 57 of the Contracts Act deals with a contract which becomes impossible or unlawful.

If this occurs "by reason of some event which the promisor could not prevent", the contract to do an unlawful act becomes void.

I consider that the refusal of the MB to renew the permit has made any continuation of work on the site illegal, as it has continued to be since 22 November 1989, until the action - see *Yong Ung Kai v. Enting [1965] MLJ 98.*

Section 57 only applies where the basis of the contract is frustrated by some event which was not contemplated by the parties at the date of the contract between them, which was in 1984, though it was later varied.

The Court must look at the underlying object of the contract and decide if it has been frustrated.

I find as a fact that the underlying purpose of the agreements was the construction by the developers of 36 flats on land provided by the owners. This, as I also find, became illegal on 22 November 1988.

Subsequent illegality, however, does not entitle a partly to regard this an excuse for its failure to perform its contractual obligations. Frustration does not affect the rights of a party if there was a prior default by the party which seeks to rely on frustration - see *Mertens v. Home Freeholds Company* [1921] KB 524.

So I have to decide, not whether the contract became illegal if performed after 22 November 1989, but whether it was the fault of the developers that this occurred.

If I were to decide that the underlying basis of the contract had already failed, by reason of the default of the developers, it would not be necessary for me to decide upon the consequences of frustration, since the principle of frustration assumes that the frustrating event was not caused by the fault of either party to the contract - see *Bank Line v. Arthur Capel & Co.* [1919] AC 435, 452.

Reliance cannot be placed on self induced frustration - see *Maritime National Fish Ltd. v. Ocean Trawlers Ltd.* [1935] AC 524.

Remedies in the Agreements

I look first at the three agreements, to see if they prescribe the remedies of the parties and the extent to which, if they do, these provisions must govern the rights of the parties, as opposed to the general law which might otherwise be applicable.

Many agreements do not themselves provide what is to happen if they are not fulfilled, wholly or in part. This is understandable, since parties do not enter agreements in the belief that something will go wrong. In this instance, however, there are various clauses in the agreements which deal with a failure by owners or developers to fulfil their obligations in events which are specified in them.

By Clause 10 of the first agreement the developers are deemed to have repudiated the agreement, after being served with a three month notice to commence work. No such notice was issued by or on behalf of the owners. Nor did this clause apply since work did begin on the site, as I have held that it did.

Under Clause 12 of the first agreement, where the developers "could not or are unable to carry out" the project completion and have stopped work, and one month's notice is given to them to complete, the developers are deemed, if still in default, to have repudiated the agreement and are obliged to pay 10% if the "construction cost" as liquidated damages.

There is provision in Clause 13 for the developers to pay B$200 per day as liquidated damages if they fail to complete the project within the time stated. This is the usual extension clause, to be found in building contracts, and is not applicable to a contract which is repudiated or to one which is not completed.

Do the rights of the parties at common law remain, or are they restricted by the terms of any agreement between them? Can party select that which suits him best, the agreement or common law. Can he, for example, if an agreement provides for liquidated damages in an agreed sum, nevertheless claim for unliquidated damages, which will in some cases be far larger, at common law?

I do not think that he can. He must, to the extent that the matter is dealt with by the agreement, pursue the remedies which that provides. But do the agreements cover what in fact occurred?

Clause 8 of the third agreement states that on commencement of construction the developers "shall render ... and also for the liquidated damages provided for under Clause 12 of the "principal agreement". It cannot, therefore be argued that either party had to be presumed to have overlooked, in 1989, the provision for liquidated damages contained in the first agreement in 1984.

The latter provides for 10% of the construction cost to be paid to the owners as "pre-estimated liquidated damages", whereupon the agreement shall be "null and void forthwith".

This clause applies if the developers, after commencement of the said project, "could not or are unable to carry the same out to its completion and has stopped work on the project". If the owners then give to the developers one month's notice and the developers remain in default, the developers are deemed to have repudiated the agreement.

The owners have not sought to invoke this clause, but have instead advanced a claim for general damages for breach of contract. The developers, by contrast, have argued that their liability is, in any of the events covered by the agreements, limited to what they would have to pay as liquidated damages under them.

I have already found that:

(a) Construction began about the end of May 1989, which can be taken as the date of commencement of the project;

(b) the developers were unable to proceed with the works as from 22 November 1989, when it became illegal to do so.

In their letter of 2 October 1989, the owners warned the developers that the contract would be terminated "if no concrete work" was carried out. On 28 March 1990, the owners stated to the developers that they were "unable and not in a position to carry out the development project". The developers were given until 6 April to reply.

I do not think that this clause applies, where the developers have proceeded with the works in however dilatory a manner up to the date when they became illegal. It is not correct to say that the contracts were repudiated by the owners because the developers could not or was unable to carry out the works before 22 November 1989. They had already by that date shown themselves to be unwilling, not unable, to carry out the works with a proper diligence.

Furthermore, no notice was ever given, such as would have brought this clause into effect, nor was any reference made to it in correspondence between the parties before the contract was repudiated.

Thus the owners are not bound by any of the provisions of the agreement for liquidated damages and are entitled to claim at common law for any losses which they may have suffered.

Damages

The main claim of the plaintiffs, is that, as a result of the developers' conduct, they have suffered loss and damages, amounting to B$2,007,416.50.

This is reached by:

(a) taking the value of the construction costs of 14.4 units;

(b) adding B$850,000 for the land price;

(c) subtracting the same sum for the present value; and

(d) subtracting B$60,000 of the price paid over an account of (b).

The construction costs were said to be B$5,168,541.30, the tender recommended by PIA. 40% of this, the owners' share of the flats, is B$2,067,416.50. This is based on a tender not accepted by the owners, who would have made little or no profit on a selling price of B$265,000 if this tender had been accepted. I do not think that it is fair to award more than the appropriate share of the lowest tender, which was for B$4,276,505.35. This would reduce the amounts under this head claimed to 40% if that total or B$1,710,602.14, less the B$60,000 paid for the land, but subject to the succeeding paragraph.

To the above sum of B$1,650,602.14 (which I award as damages) must be added, or subtracted, the value of the cleared and levelled site, as it exists at present, assuming that permission were granted to build upon it in the failure. This amount should be compared with the B$850,000 which was to be paid to the owners for their interest in the land and an appropriate addition or subtraction made.

I consider that the site should be valued as if construction of the two blocks of flats on it were permitted, as this was the basis on which an amount of B$850,000 was payable to the owners.

I therefore ask the Chief Registrar, to be so kind as to assess the value of this site for building purposes, so that an appropriate addition or deduction can be made to or from the sum awarded to the owners as damages.

I do not, however, want to keep the owners out of their money indefinitely. I therefore order that the developers should pay half the damages within two months of today. The balance, if any, should be paid within two months of the valuation by the Chief Registrar.

The alternative claim, if damages for lost rent, was not pursued at the trial and I make no award in relation to it.

Power of Attorney

The owners seek the revocation of the power of attorney granted by them to the developers in March 1989 to enable the latter to convey their share of the flats to purchasers in freehold.

The power of attorney, however, was expressed to be irrevocable, though it was given for a purpose which has wholly failed. I can understand the owners' desire to secure the cancellation of this power, since they foresee a possible exercise of it in the future by the developers, thought the latter have undertaken to hand over the document concerned at the conclusion of this hearing, as I am sure they will do.

Since the power of attorney is irrevocable, I have not been able to find anything which justifies me in rescinding it. Thus I do not seem to have the power (though I have not had the benefit of full argument as to this) either to declare that the plaintiffs are entitled to revoke, it, or to revoke it myself.

I can state that purpose for which it was granted has wholly failed and that, as the developers do not own 21.6 flats, there is nothing on which the power of attorney can operate.

I can, and do, order that the original and all copies of the power of attorney shall be returned to the owners, though it will be for them to take such steps as are open to them to secure the cancellation of this power at the Attorney General's chambers.

Other relief sought by plaintiffs

It follows from my finding that the plaintiffs were entitled to repudiate the agreements in May 1990, that an injunction should be (and hereby) issued restraining the defendants from dealing, with the land concerned in any way and, if this is necessary, an order that the possession of the land should be given forthwith to the plaintiffs.

Interest shall be payable at 6% from the date of repudiation on 12 May 1990 until payment.

Counterclaim

There is a counterclaim by the defendants for B$984,802 being monies expended, or due, on the development project and a loss of profits of B$1,981,000. I would have regarded the latter total, even if I had found for the defendants, as grossly exaggerated, since I consider that the loss of profits by the developers would have been very small, if the project had been completed.

The various sums which were spent by the developers and were included in the counterclaim were expended on matters for which they were liable under the agreements, for example expenditure on earthworks and on architects' fees. They are therefore not entitled to claim for them, on my finding that the owners were justified in their repudiation of the agreements.

It may be that part of this expenditure has increased the value that land to the owners. The list of expenditure by the developers, for example, shows that about B$365,000 was spent on earthworks and retaining walls. If the result of this has been to make the site worth more than B$850,000 a suitable deduction will be made from the total of B$1,650,602.14 provisionally awarded to the plaintiff.

The defendants are not entitled to any award for loss of profits. The counterclaim is dismissed.

Costs

I see no reason why costs should not follow the event.

I award costs to the plaintiffs against the defendants on both claim and counterclaim.

The costs should be agreed. If they are not agreed they must be taxed.

Also found at [1992] 2 CLJ 1100